Supreme Court, U.S.
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NO. 08-623

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IN THE
UNITED STATES SUPREME COURT

STEPHANIE STUCKY,
PLAINTIFF-PETITIONER

vs.

DEPARTMENT OF EDUCATION, STATE OF HAWAII, ET. AL.
DEFENDANTS - RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES NINTH CIRCUIT COURT ORDER UPHOLDING JUDGMENT FROM THE DISTRICT OF HAWAII

CERTIFICATE OF SERVICE

ANDRE' S. WOOTEN 3887
Attorney of Record
ANDRE' S. WOOTEN, Attorney at Law
Century Square, Suite. 1909
1188 Bishop Street
Honolulu, Hawaii 96813
Telephone No. (808) 545-4165

Attorney of Record for Plaintiff-Petitioner,
STEPHANIE STUCKY

A. THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals panel err when it ruled that The District Judge did not err when he ruled that the Defendants and the State of Hawaii Department of Education did not discriminate against Petitioner due to her gender and retaliate illegally against Plaintiff-Petitioner, when she was denied a trial due to the grant of their Motion for Summary Judgment?

A. Did the Ninth Circuit Court of Appeals panel err when it ruled that while the District Judge admits the Plaintiff-Petitioner, Stephanie Stucky, did set forth a primae facie case of gender discrimination. At page 18 of his order, R.A. 4-27, that The District Judge did not err when he ruled the Plaintiff "fails to demonstrate pre-text."

B. Are not these irreconcilable differences of opinion on the material facts of the case, which are for the jury to decide? Especially here The Defendants say yes, Plaintiff says no.

C. After Plaintiff has established a primae facie case of discrimination, there must exist a Material question of Fact, whether the jury will find the reasons stated by the Defendants for discriminating against Plaintiff-Petitioner in the terms and conditions of her employment, are in fact pre-textual given the fact that a primae

facie case of discrimination was established?

D. Specifically in this case, where Plaintiff has complained of routine and annual discrimination in the distribution of department funds in favor of the male teacher to Petitioner's disadvantage. If the Art Department never actually voted to eliminate Plaintiff's music position, as Defendant principal Kilborn claimed, is that not conclusive evidence of the pre-textual nature of her motives?

No evidence of any such vote was presented by the Defendants. And Plaintiff's declaration establishes that there was none, hence the District Court and Appellate Court erred when they ruled Plaintiff had not presented sufficient evidence of pre-text to deserve a jury trial. Docket # 54. RA. Page 4-27. Declaration of Plaintiff Paragraphs 7-9, RA P 80-84.

3. Did Plaintiff-Petitioner Stucky show that she was the victim of an adverse employment action when she was suspended without pay, whether she was terminated and re-instated or not? Which the District Court concedes at page 19 of his order.

4. Did not the Appellate Court and the District judge err when they both refused to address the Disparate treatment allegations Regarding the male teacher, which Plaintiff provided evidence of? P. 20, RA. Page. 4-27.

5. Did not the Appellate Court and the District judge err when they weighed the evidence and then agreed with State's

argument of Legitimate Non-discriminatory reasons for taking their negative actions against the Plaintiff, prevented Plaintiff from having a jury trial to determine whether those reasons for disparate treatment were a pre-text or not.

Exhibit 3, Order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment February 15th 2007. Docket # 54. RA. Page. 4-27.

6. Did the Appellate Court and The District Judge err when they ruled that Claims Stucky failed to prove pre-text? Even when the Plaintiff's declaration establishes sufficient questions of fact as to whether the Art Department tried to eliminate her music class or whether Defendant Kilborn did it unilaterally. Which is a Material Question of fact in this case. Declaration of Plaintiff paragraph 7, in opposition to Defendant's Summary Judgment motion. R.A. page 80-84.

The Plaintiff presented sufficient evidence of whether there was no departmental vote and in fact there was a unilateral corporate decision to get her out of the school she had been teaching in for 24 years, in which she had seniority under the union contract. Discriminatory actions which also violate the seniority provisions of that contract, in a manner that was also retaliatory. Was the Plaintiff-Petitioner denied her constitutional right to a jury trial improperly.

Did the Appellate court and the District Judge err when they granted Summary Judgment and ruled against giving Plaintiff a trial on the facts material to her Title VII violation claim.

1. The court discussed the McDonald Douglas - burden shifting analysis under Title VII at page 10 of it's order. Docket # 54. RA. Page 4-27.

2. The Court acknowledged "She (Plaintiff) engaged in a Protected Activity opposing an unfair employment practice.

3. The court stated, at page 10, of it's final order that: "Both parties agree about the 1998 HCRC Complaint and related 2000 civil rights violation and Retaliation suit." Being "protected activities under the applicable civil rights laws." However, the court ignored the ongoing nature of the litigation and appeal process, which takes years and was still on going even at that time. Docket # 54. RA. Page 4-27.

7. Did not the Appellate Court err when it agreed the District Judge did not err when he wrote that the Plaintiff's actions during 2000 to 2005, of filing union grievances concerning her treatment and condition on the job, were not "protected activities", under the applicable civil rights laws?

Plaintiff's claims however, were specifically directed to specific acts of gender discrimination in the provision of goods, supplies,

services and treatment of music teaching books, tools, instruments and equipment, budgeted for her but not provided to her as it was to the male music teacher in her 2 person music department, as part of the Art Department. Declaration of Plaintiff Paragraphs 7-9, RA , P 80-84. Appendix No. 11, June 16, 2008 Ninth Circuit Court of Appeals order.

8. Were not the Plaintiff-Petitioner's right to non-discriminatory public education employment and academic freedom, which include the right to protest discriminatory treatment in teaching, and is similar to the rights upheld in HOLLISTER v. TUTTLE, 210 F.3d 1033 (9th Cir. 2000) violated when the Appellate Court and District court ruled contrary to the dictates of HOLLISTER v. TUTTLE, supra., which stated :

> "a faculty member at PSU, had a clearly established right to speak freely on public educational issues and that it was, therefore, error to recognize qualified immunity on the part of defendants alleged to have retaliated against him by denying him a promotion and pay increases. We, accordingly, reverse this part of the judgment and remand." HOLLISTER v. TUTTLE, 210 F.3d 1033 (9th Cir. 2000)

9. Thus Did not the Appellate Court

and the District Court err by ruling that Plaintiff's First Amendment actions, and related Union discriminatory treatment grievance complaints are Not protected from Retaliation under Title VII when they are connected to opposing discriminatory treatment. HOLLISTER v. TUTTLE, 210 F.3d 1033 (9th Cir. 2000).

1. Stucky complained of unequal treatment - "In the terms and conditions of her employment" as contrasted with the male teacher who was provided all aids and resources he requested, while she was denied. Declaration of Plaintiff Paragraphs 2-9, RA , P 80-84.

10. Did not the Appellate Court and The District Court err when they ruled that only the 1998 complaint and 2000 complaints were "protected activity'. Order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment February 15th 2007. Docket # 54. RA. Page 4-27. That unfair treatment, is further clear circumstantial evidence of discrimination in this case however.

11. Did not the Appellate Court and the District Judge err again when they ruled that the 1998 and law suit filed in 2000, which when to trial years later and was still on appeal at the time Defendants sought to eliminate Plaintiff's job, was too remote in time to be the cause of the retaliation Plaintiff claimed she was suffered at the hands of the Defendant Department of

Education, whom she was suing and her principal, it's employee. Docket # 54. RA. Page 4-27. Appendix No. 11.

12. Did not the Appellate Court and the District Judge err again when they ruled that there were insufficient temporal prerequisites to establish retaliation, when that issue is a question of fact for the jury, as stated in PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004).

13. Did not the Appellate Court and the District Judge err again when they upheld the granting of the Defendant's Motion to For Summary Judgment, holding there was insufficient proof of the Causal Connection. The Appellate Court like the District Judge ignored the fact that the 1993 EEO complaint begat the 2000 EEO law suit Complaint which went to trial and continued on appeal through 2005. Plaintiff suffered the same retaliatory and gender discriminatory treatment in the 2 music teacher department which continued from 1998 and 2000 to 2005 and indeed continued until Plaintiff was subsequently fired by the Defendants. PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004). Docket # 54. RA. Page 4-27.

14. Did not the Appellate Court and the District Judge err again when they acknowledged the fact that Defendant Kilborn testified for the Defendant D.O.E. and former principal Ayson at trial against Plaintiff. But says

since the suit was filed in 2000 there court be no retaliatory motive. But they ignore the fact the principal gave testimony against Plaintiff-Petitioner when the case finally went to trial in 2005. And the retaliation continued during 2000 to 2005. And within the next year Plaintiff filed grievances and EEO complaints of discriminatory treat, including the attempt to improperly remove Plaintiff-Petitioner from the faculty of the school, before the Defendants wrongfully suspended Plaintiff-Petitioner.

15. Did not the Appellate Court and the District Judge err again when they did not rule that some of the grievances filed by Plaintiff from 2000 to 2005, did not relate to unfair and discriminatory treatment by Defendants against Plaintiff, which is protected activity. Declaration of Plaintiff Paragraphs 7-9, RA P 80-84.

The adversarial facts during the litigation years with the Defendant D.O.E. 2000 to 2005 are clear evidence Defendants assertions of corporate restructuring are merely pre-texts for the court not to allow a jury to examine the details of the Defendants actions. RA 72-79, 80-84, Docket document No. 43. NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN, 536 U.S. 101 (2002); MATHEWSON v. ALOHA AIRLINES, INC., 82 Haw. 57 (1996) 919 P.2d 969.

See. R.A. Page 72-74. The Cover sheet of appeal brief. Showing that the D.O.E. knew well of this on going litigation. And

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therefore, this corporate knowledge is imputed to principal Kilborn for her retaliatory actions in response to having to testify to defend the former principal and the DOE in Plaintiff's prior sex discrimination and retaliation suit against the Defendant State of Hawaii Department of Education.

B. THE PARTIES TO THE PROCEEDING

1. The Plaintiff STEPHANIE STUCKY had been employed as a teacher by the Defendant STATE OF HAWAII DEPARTMENT OF EDUCATION since 1982 to 2007. The relevant events in this complaint occurred when the Plaintiff was working at Iao Intermediate School, in the County of Maui, State of Hawaii. The Plaintiff is female, a citizen of the United States, and a resident of the city of Kahului, in the County of Maui, State of Hawaii.

2. Defendant STATE OF HAWAII DEPARTMENT OF EDUCATION ("D.O.E.") is and was at all times relevant a governmental agency incorporated by the State of Hawaii, responsible for hiring, training, supervising, promoting, and disciplining employees of the D.O.E. and setting policy for the D.O.E. It administers all the public schools up to and including the secondary level in the State of Hawaii. It is sued in its official capacity.

3. Defendant PATRICIA HAMAMOTO is and was at all times relevant employed by

Defendant D.O.E. as Superintendent for all schools under Defendant D.O.E. As such, she was responsible for the administration of and setting policy for all schools under Defendant D.O.E., including Iao Intermediate School, where the Plaintiff worked. On information and belief she is and was at all times relevant a citizen of the United States and a resident of the County of Maui, State of Hawaii. She is sued in her official capacity.

4. Defendant KEN NOMURA is and was at all times relevant employed by Defendant D.O.E. as the Complex Area Superintendent for the Baldwin-Kekaulike-Maui Complex Area, which includes Iao Intermediate School, where the Plaintiff worked. As such, Defendant KEN NOMURA was responsible for the administration and supervision of all schools in the Baldwin-Kekaulike-Maui Complex Area. On information and belief he is and was at all times relevant a citizen of the United States and a resident of the County of Maui, State of Hawaii. He is sued in his official capacity.

5. Defendant CATHERINE KILBORN is and was at all times relevant employed by Defendant D.O.E. as Principal of Iao Intermediate School, in the County of Maui, State of Hawaii. As such, she was responsible for the supervision and discipline of teachers working at Iao Intermediate School, including the Plaintiff. On information and belief, she is and was at all times relevant a citizen of the United States and a resident of the

County of Maui, State of Hawaii. She is sued in both her official and individual capacities for acts she personally committed.

C. STATEMENT OF THE BASIS OF SUPREME COURT JURISDICTION

PLAINTIFF, STEPHANIE STUCKY, filed a Complaint for damages for violation of her Civil Rights, under Federal Civil Rights Laws 42 U.S.C. §§ 2000(e), Title VII and Title IX of the Education Amendments of 1972, 86 Stat. 373-375, 20 U.S.C. § 1681- 1688. , which arise under original jurisdiction, after receiving a 90 right to sue letter from the Federal EEOC and the Hawaii State Civil Rights Commission on January 3, 2006. Case Docket No. 1. RA. 1. And 42 U.S.C. 1981.

Defendant Catherine Kilborn filed a Motion for Judgment on the Pleadings on September 22, 2006. Docket No. 29. And the Defendant State of Hawaii filed a Motion for Judgment on the Pleadings or in the alternative for Summary Judgment on September 27, 2006. Docket No. 32. And Order regarding the State's Motion for Judgment on the Pleadings was entered on September 28, 2006. Docket # 35.

A hearing was held upon the Defendant State of Hawaii filed a Motion for Judgment on the Pleadings or in the alternative for Summary Judgment on November 27, 2006. Docket No 43.

On February 15, 2007 the District judge entered an order Granting Defendant's Motion for

Judgment on the Pleadings Or, In The Alternative For Summary Judgment. Docket # 54. R.A. Ex 3, Pages 28-51. A judgement was entered February 15, 2007 for Defendants. Docket # 55.

A timely appeal pursuant to Fed. R. Civ. P. 54(b); RULE 404, FRAP, 28 U.S.C. § 636(b)(1)(A) (LR 74.1) and 28 U.S.C. sec. 1292, was filed on March 9, 2006. R.A. Docket No. 56, R.A. P. 1.

On July 20, 2008 the Ninth Circuit Court of Appeals filed a Summary Order after denying Plaintiff-Petitioner a hearing affirming the February 15, 2007 the District judge entered an order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment. Appendix No. 11.

This Petition for Writ of Certiorari is timely filed pursuant to Rules 10, 11, 12, 13, 14, 33, 34 and 38 of the United States Supreme Court Rules.

D. STATEMENT OF THE CONSTITUTIONAL PROVISIONS, STATUTES, TREATIES AND OR REGULATIONS INVOLVED IN THE CASE

42 U.S.C. §§ 2000(e), Title VII and Title IX of the Education Amendments of 1972, 86 Stat. 373-375, 20 U.S.C. § 1681- 1688. 42 U.S.C. 1981.

E. THE CONCISE STATEMENT OF THE CASE

The Plaintiff had been working for Defendant D.O.E. as a teacher at Iao Intermediate School, in the County of Maui, State of Hawaii. She was hired by Defendant D.O.E. in 1982 until termination in 2007.

In the late 1990s and early 2000, the Plaintiff filed several Union grievances against Defendant D.O.E., its administrators, and the principle of Iao Intermediate School alleging unfair and discriminatory treatment, which violated the union contract.

On or about November 17, 1998, the Plaintiff filed an age discrimination complaint with the Hawaii Civil Rights Commission (HCRC) against Defendant D.O.E.

On or about January 11, 2000, the Plaintiff filed a retaliation discrimination complaint with the Hawaii State Civil Rights Commission against Defendant D.O.E.

After the Plaintiff filed the Union grievances and the HCRC complaints, Defendant D.O.E. began to retaliate against her for filing those complaints.

Defendant CATHERINE KILBORN constantly issued petty directives to the Plaintiff. These directives included one issued on February 17, 2005, which required the Plaintiff and only the Plaintiff to provide Defendant CATHERINE KILBORN with an explanation of her grade book markings/weights and a grading policy. Defendant CATHERINE KILBORN did not issue similar directives to any other teachers.

Defendant CATHERINE KILBORN repeatedly denied any of the Plaintiff's requests for supplies related to her work. Defendant D.O.E. had enough money in its school budget to cover these supplies. Defendant CATHERINE KILBORN did not deny other teachers' requests for supplies. The lack of supplies made it harder for Plaintiff to perform her expected duties.

Defendant CATHERINE KILBORN falsely accused the Plaintiff of discussing personnel actions with students. Defendant CATHERINE KILBORN falsely accused the Plaintiff of asking students to have their parents take action against issues such as fleas being in the school. Defendant CATHERINE KILBORN falsely accused the Plaintiff of causing a student to be late for testing. Defendant CATHERINE KILBORN's accusations against the Plaintiff have no factual basis.

The Plaintiff was removed from her usual music room and assigned to conduct music classes in the school's cafeteria. Two (2) ukaleles were stolen from the cafeteria. When the Plaintiff investigated this theft, Defendant CATHERINE KILBORN reprimanded her for it.

On or about February 25, 2005, Defendant CATHERINE KILBORN issued an official letter of reprimand to the Plaintiff. This letter of reprimand alleged that the Plaintiff failed to comply with Defendant CATHERINE KILBORN's directive issued February 17, 2005, that required the Plaintiff to provide an explanation of her grade book

markings/weights and a grading policy.

On or about April 5, 2005, Defendant CATHERINE KILBORN staff-reduced the Plaintiff's music position, thereby eliminating her job at Iao Intermediate School. Defendant KEN NOMURA concurred with Defendant CATHERINE KILBORN's decision to eliminate the Plaintiff's job, and issued the final order.

These actions committed against the Plaintiff were done in retaliation for complaints she had previously filed against her employer, and because of her sex, female.

SUBSEQUENT ACTS OF RETALIATION

The Plaintiff filed complaints with the Hawaii Civil Rights Commission and the Federal EEOC on August 3, 2005, against the Defendants for violating her civil rights, and subsequently filed a Complaint initiating action in U.S. District Court on January 3, 2006.

From the time the Plaintiff filed those complaints to this day the Defendants continue to illegally retaliate against her.

The Plaintiff filed another complaint with the Hawaii Civil Rights Commission in late January of 2006 for further harassment and retaliation. Again the Defendants illegally retaliated for the filing of that complaint.

PLAINTIFF'S SUSPENSION

In a letter dated January 27, 2006, Defendant CATHERINE KILBORN informed the Plaintiff that she would be suspended without pay.

The reason given to the Plaintiff for the suspension was that the Plaintiff allegedly failed to render aid to an injured student. This allegation was mere pretext for her suspension, an illegal act of retaliation.

PLAINTIFF'S TERMINATION

The most recent evidence of the Defendants' illegal retaliation is the Plaintiff's PEP-T Final Rating Form dated May 25, 2006, in which the Defendants rated her as "UNSATISFACTORY" in three of her five duties and as "MARGINAL" in the remaining two duties, and the Plaintiff's subsequent termination.

The Defendants gave these poor ratings to her in order to eventually use them as pretext for her unlawful termination. In a letter dated August 1, 2006, the Defendants indeed sent the Plaintiff a letter indicating that she would be terminated, and pointed to the PEP-T Final Rating Form as pretext, and in an internal memo dated August 1, 2006.

The Plaintiff, a teacher with the State of Hawaii DOE for **twenty-four (24) years**, suddenly receives "UNSATISFACTORY" ratings leading to her termination after having filed civil rights complaints.

Further telling is Defendant CATHERINE KILBORN's actions during a meeting held on May 26, 2006, to inform the Plaintiff of her PEP-T Rating. Defendant CATHERINE KILBORN's actions are described in a letter to her from Union Uni-Serv

Director Eric Nagamine.

During that meeting, Defendant CATHERINE KILBORN refused to explain or even justify the "UNSATISFACTORY" rating given to the Plaintiff. Furthermore, Defendant CATHERINE KILBORN violated Union contract by refusing to provide a copy of the verbal discussion with the Plaintiff during the meeting.

Defendant CATHERINE KILBORN then verbally agreed with Mr. Eric Nagamine that the meeting indeed was considered an "informal discussion" for the purposes of grievance procedure. Despite this, she later denied that it was. This is clearly indicated in Mr. Eric Nagamine's letter to Robyn Honda, dated June 6, 2006.

The Defendants illegally retaliated against the Plaintiff for filing civil rights complaints. They terminated the Plaintiff's employment by using pretext such as her poor PEP-T Ratings. The Plaintiff had worked for the State of Hawaii DOE for **twenty-four (24) years**.

The irreparable harm caused to the Plaintiff is enormous and increasing everyday. Termination of her employment has damaged her reputation and career as a teacher. Docket No. 1.

In Plaintiff Stephanie Stucky's Declaration In Opposition to Defendant's Summary Judgment Motion she wrote.

2. While Plaintiff is and has been employed as a music Teacher for the DOE on Maui for over 20 years, she is presently suspended by Defendant Kilborn, and locked out of the school and her class room pending termination. And principal Kilborn continues to retaliate against Plaintiff for filing grievances over union contract violations at the school, as Plaintiff had over violations caused by former principal Ayson, for whom Defendant Kilborn testified in 2nd Circuit court, as her Vice Principal.

3. Defendant Kilborn discriminated against and harassed Plaintiff in particular over this issue, even after Plaintiff responded fully.

4. Plaintiff conversed on school matters with parents, not personal ones. Specifically Defendant Kilborn's removing her from the music room, saying she is going to create a computer room and not doing so, while sending Plaintiff and 100's of music students to the old cafeteria room, unsuitable for music classes, lacking in security storage for valuable instruments, and infested with fleas. Which complaints from Plaintiff Defendant Kilborn ignored until the

parents of bitten students started complaining to her.

5. Defendant Kilborn made this decision to
move my band room, but not the other music teacher unilaterally, and then failed to implement the computer course after removing Plaintiff.

6. Defendant Kilborn removed Plaintiff from the music room, saying she was going to create a computer room and then she did not do so. She sent Plaintiff and 100's of music students to the old cafeteria room, unsuitable for music classes, lacking in security storage for valuable instruments, and infested with fleas. Which complaints from Plaintiff Defendant Kilborn totally ignored until the parents of bitten students started complaining to her directly. Defendant Kilborn still does not say what SHE did about the fleas and rats.

7. Defendant Kilborn unilaterally sought to get rid of Plaintiff, by striking her music class. The Department did not vote on it. The HSTA union had to convince her to "reconsider" by pointing out that her actions were in violation of the contract. And only after Plaintiff filed a grievance about being improperly "staff reduced" and

bounced out of the school where she has taught for 20 years, in violation of the HSTA-DOE contract, was she re-instated to the school. Actions of Defendant Kilborn that both upset and caused Plaintiff to expend time and file grievances to defend both her contract and her constitutional rights. Then throughout the next year Defendant Kilborn retaliated against Plaintiff for filing and winning this grievance, as well as filing others.

8. Defendant Kilborn routinely denied, delayed, waylaid, mislaid, forgot and re-routed Plaintiff's requested supplies, and delayed or refused to fill book requisitions, and instrument orders, from the $3000 annual portion of the music dept. budget allocated to Plaintiff.

F. DIRECT, CONCISE ARGUMENT

A. The Ninth Circuit Appellate court and the Hawaii District Judge erred when they wrote that the Plaintiff's actions during 2000 to 2005, of filing union grievances concerning her treatment and condition on the job, were not "protected activities", under the applicable civil rights laws. Plaintiff's claims however, were specifically directed to specific acts of gender discrimination in the provision of goods, supplies, services and

treatment of music teaching books, tools, instruments and equipment, budgeted for her but not provided to her as it was to the male music teacher in her 2 person music department, as part of the Art Department. Declaration of Plaintiff Paragraph 9, RA , P 80-84.

While the court is correct in stating the Plaintiff's civil complaint was filed on January 3, 2006, in The U.S. District court with reference to both the EEOC and State of Hawaii Right To Sue Letters.

The courts below ignored the facts that before the law suit involving those legal complaints were filed however, the Defendants were informed that Plaintiff had filed the EEOC administrative complaints with the Federal EEOC and State HCRC in April or May of 2005, of which Defendants were notified no later than August 2005.

Therefore, Plaintiff logically asserts that under BURLINGTON N. & S.F.R. CO. v. WHITE, 05-259 (U.S. 2006) 126 S. Ct. 2405, that the actions the Defendants took against her after receiving notice of this EEO and HCRC August 2005 were clearly in retaliation for her having engaged in protected activity, such as filing her EEO complaint. And adverse employment actions taken against Plaintiff 300 days before the April 2005 EEOC filing should be considered for discriminatory effect and motive. BURLINGTON N. & S.F.R. CO. v. WHITE, 05-259 (U.S. 2006) 126 S. Ct. 2405.

B. And the courts below further erred in refusing to consider retaliation against Plaintiff for filing union grievances of discriminatory union contract violations by the Defendants during 2000 to 2005. And then ignores more recent actions such as attempting to remove her position and her job from the school in violation of the union contract, and move her from a "music room" to a cafeteria with no locks for the instruments and fleas and rats, as well as repeated demands made upon Plaintiff to explain her grading policy. Demands not made upon other teachers, all in response to a parents grade complaint, were harassment after Plaintiff tendered her explanation.

The Appellate court's ruling ignored the Plaintiff's right to non-discriminatory public education employment and academic freedom includes the right to protest discriminatory treatment in teaching, is similar to the rights upheld in HOLLISTER v. TUTTLE, 210 F.3d 1033 (9th Cir. 2000) where the court ruled:

> "a faculty member at PSU, had a clearly established right to speak freely on public educational issues and that it was, therefore, error to recognize qualified immunity on the part of defendants alleged to have retaliated against him by denying him a promotion and pay increases. We, accordingly, reverse this part of the

judgment and remand." HOLLISTER v. TUTTLE, 210 F.3d 1033 (9th Cir. 2000)

2. Teachers have a right to speak to parents

and students about matters affecting their education and safety. The teacher has a constitutional right under Title VII to be protected from retaliation for speaking out and filing administrative complaints about unfair treatment on the job. Thus the Appellate Court was in error ruling that Plaintiff's First Amendment actions, and related Union discriminatory treatment grievance complaints are Not protected from Retaliation under Title VII when they are connected to opposing discriminatory treatment. HOLLISTER v. TUTTLE, 210 F.3d 1033 (9th Cir. 2000).

3. Plaintiff Stucky complained of unequal

treatment - "In the terms and conditions of her employment" as contrasted with the male teacher who was provided all aids and resources he requested, while she was denied. This went on for years, culminating with her attempted removal improperly from the school by Defendants both before the 2005 and 2006 school years through different improper maneuvers, that were later rescinded after Plaintiff protested and filed a union grievance.

In 2005, Defendant Kilborn attempted to eliminate Plaintiff's music teacher position and therefore her from the school, in violation of the

HSTA-DOE union contract.

And right after she lost that union arbitration, Defendant Kilborn and the DOE decided to create bad evaluations of Plaintiff and fire her for the school year 2006. Therefore, Plaintiff Stucky had to protest these improper actions by the Defendants, to keep from being abused and lose her job in violation of the rules repeatedly. And the Defendants continue to retaliate against her for doing so. Declaration of Plaintiff Paragraph 9, RA , P 80-84.

4. The Appellate Court erred when they ruled

that only the 1998 complaint and 2000 complaints were "protected activity'. Order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment February 15th 2007. Docket # 54. RA. Ex 2. That unfair treatment, is further clear circumstantial evidence of discrimination in this case however.

The Appellate court and District Judges erred again when they ruled that the 1998 and law suit filed in 2000, which when to trial years later and was still on appeal at the time Defendants sought to eliminate Plaintiff's job, was too remote in time to be the cause of the retaliation Plaintiff claimed she was suffered at the hands of the Defendant Department of Education, whom she was suing and her principal, it's employee.

That was an erroneous conclusion for

causation, not temporal prerequisites are the real issue as stated in PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004).

> Although a lack of temporal proximity may make it more difficult to show causation, "circumstantial evidence of a `pattern of antagonism' following the protected conduct can also give rise to the inference." Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3rd Cir. 1997) (citation omitted).
>
> The Third Circuit explained: It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.
>
> Our cases are consistent with this approach. In Coszalter v. City of Salem, 320 F.3d 968, 977-78 (9th Cir. 2003), we cautioned that a "specified time period

cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." In Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276, 1287 n. 10 (9th Cir. 2001), the majority rejected the dissent's argument that Breeden precluded the inferences drawn by the jury below. PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004)

G. The Appellate court erred when it upheld the grant of the Defendant's Motion to Dismiss claiming there was insufficient proof of the Causal Connection. The Appellate and District Court Judges improperly ignore the fact that the 1993 EEO complaint begat the 2000 EEO law suit Complaint which went to trial and continued on appeal in 2005. It is the same retaliatory and gender discriminatory treatment of the 2 music teacher activity continued from 1998 and 2000 to 2005 and indeed continues to the present day. PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004)

H. The Appellate Judges also acknowledged the fact that Defendant Kilborn testified for the Defendant D.O.E. and former principal Ayson at trial against Plaintiff. But they

say since the suit was filed in 2000 there court be no retaliatory motive. But this ignores the fact the testimony and trial were in 2005. And the retaliation continued during 2000 to 2005, which is which Plaintiff filed grievances, since she was already in court and knew that was very expensive.

I. The District Judge erred when he did not rule that some of the grievances filed by Plaintiff from 2000 to 2005, did not relate to unfair and discriminatory treatment by Defendants against Plaintiff, which is protected activity. Declaration of Plaintiff Paragraphs 7-9.

J. The District Judge erred when he ruled the "school made the decision to eliminate Plaintiff's music teacher class and position. That is false. Defendant Kilborn was "the school." The Plaintiff's Art department did not vote to move the Plaintiff or eliminate her music class. Defendant Kilborn did that unilaterally. Declaration of Plaintiff Paragraph 7. The District court improperly ignores the discriminatory treatment and harassment plaintiff complained of in the years 2000 to 2005. Defendant Kilborn, as V.P. of the school administration has a connection to those complaints. One of her first acts as principal is to attempt improperly to get rid of Plaintiff. It is clearly a question of fact for the jury under the circumstances whether those actions were retaliatory. Exhibit 3, Order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative

For Summary Judgment February 15th 2007. Docket # 54. RA. Page. 4-27.

The adversarial facts during the litigation years with the Defendant D.O.E. 2000 to 2005 are clear evidence Defendants assertions of corporate restructuring are merely pre-texts for the court not to allow a jury to examine the details of the Defendants actions. RA 71-83, 89-100, Docket document No. 43. NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN, 536 U.S. 101 (2002); MATHEWSON v. ALOHA AIRLINES, INC., *82 Haw. 57* (1996) 919 P.2d 969.

C. The District Judge erred when he ruled that the Defendant State of Hawaii Department of Education was not liable for gender discrimination and retaliation in its actions towards Plaintiff.

1. The Appellate court and District Judge admit the Plaintiff Stephanie Stucky set forth a primae facie case of gender discrimination. See page P 18 of order, R.A. Ex. 3,

2. The District Judge erred when he rule the Plaintiff "fails to demonstrate pre-text." But these Differences of opinion, whether the facts which establish the primae facie case or sufficient to establish

3. Plaintiff Stucky has shown adverse employment action in Suspension without pay. Whether she was terminated and re-instated or not. Which the District Court concedes.

4. However, the District judge erred when he refused to address the Disparate treatment allegations Regarding the male teacher, which Plaintiff provided evidence of to prove during the grievance process. P. 20.

> Amid a rising tide of retaliatory job bias claims and last year's Robinson v. Shell Oil Co., 519 U.S. 337 (1997) Supreme Court decision, the EEOC has issued guidelines to help litigators interpret statutes involving retaliation and employment discrimination.
>
> The manual describes what constitutes protected activity, what "adverse actions" by employers can be challenged as retaliatory, and what evidence is needed to prove those actions were taken because of protected activity. (EEOC, EEOC Compliance Manual, No. 915.003 (May 20, 1998); available at http://www.eeoc.gov/docs/retal.txt or by writing to EEOC, Office of Communications and Legislative Affairs, 1801 L St. N.W., Washington, DC 20507.)
>
> The EEOC said the number of charges alleging retaliation has more than doubled in the past several years. In 1991, the commission received more than 7,900 claims, and, in 1997, the number jumped to more than 18,100.

The EEOC emphasized that protected activity includes opposing discrimination in the workplace as well as participating in the complaint process. For example, employees who believe they are the target of discriminatory practices-as well as friends and coworkers who may have been unlawfully deterred from testifying on the employee's behalf-can challenge retaliatory acts by employers. (Emphasis added)

The agency also noted that **the underlying discrimination claim does not have to be reasonable or valid to make a case for employer retaliation.** To require otherwise, "would chill the rights of all individuals protected by the anti-discrimination statutes," the guidance said. (Emphasis added)

In defining what constitutes adverse actions by employers, the EEOC included negative job references. This guidance follows the recent Robinson case (519 U.S. 337 (1997)), where the Supreme Court found that federal civil rights laws protect former-not just current-workers from retaliation by employers who have been charged with discrimination. (Discrimination provision expanded to cover former

workers, TRIAL, May 1997, at 88.)

Other **adverse actions include "significant retaliatory treatment that is reasonably likely to deter protected activity." The agency said there is no requirement that actions against employees "materially affect the terms, conditions, or privileges of employment."** (Emphasis added)

The Ninth Circuit, has found that the degree of harm suffered by an individual goes to the issue of damages, not liability. (Hashimoto v. Dalton, 118 F.3d 671, 676 (9th Cir. 1997).

In terms of proving a causal connection between protected activity and an employer's adverse action, the EEOC said evidence may be direct-which the agency noted is rarely present-or circumstantial.

"A violation is established . . . if the respondent fails to produce evidence of a legitimate, nonretaliatory reason for the challenged action, or if the reason advanced by the respondent is a pretext to hide the retaliatory motive."

5. The District judge erred when he agreed with State's argument of Legit Non-

discriminatory reasons for taking their negative actions against the Plaintiff.

A. Parental complaints.

2. Plaintiff's set up Music Room moved for new computer room, that was not constructed.

C. The School proposed abolishing music and her electives for music.

(But they lost the grievance over that because it violated DOE rules.

Declaration of Plaintiff para 2-9 RA 80-84. Order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment February 15th 2007.. Docket # 54. RA. Page. 4-27.

D. The Appellate court and the District Judge erred when they ruled that Petitioner Stucky failed to prove pre-text.

1. The lower courts erred when they claim the one on one comparison in the treatment of the only mail music teacher with that of the only female music teacher in the school is too small a sample. Those are the discriminatory facts of this case at this school.

The ruling is a clear misunderstanding of the law of discrimination. Those discriminatory facts ARE SUFFICIENT PROOF OF PRE-TEXT.

2. The lower courts erred in claiming that because Stucky did not prove other female

teachers in other departments were treated as badly as she there was no discrimination proved on the basis of gender.

However, those non-music teachers were not similarly situated regarding budgetary entitlements as music teachers.

The Plaintiff's declaration and the history of complaints and harmful actions taken by Defendants against Plaintiff over the years establish a pattern of a "hostile and retaliatory work environment for Plaintiff. Over which the District court had jurisdiction through Title VII, as well as Title IX and pendent jurisdiction through H.R.S. 378-2. And for which causes of action Plaintiff established a prima facie case, and sufficient evidence Defendants stated reasons were pre-texts for discrimination in a hostile work environment. Exhibit 3, Order Granting Defendant's Motion for Judgment on the Pleadings Or, In The Alternative For Summary Judgment February 15th 2007. Docket # 54. RA. Page. ?

B. At the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *See* T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n., 809 F.2d 626, 630-31 (9th Cir. 1987).

> However, once the moving party meets the requirements of Rule 56 by showing there is an absence of

evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

We review the district court's order granting summary judgment de novo, drawing "all reasonable inferences supported by the evidence in favor of the non-moving party." Villiarimo v. Aloha Island Air, Inc. 281 F.3d 1054, 1061 (9th Cir. 2002).

C. "In reviewing an order denying or granting summary judgment, we must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." Ray v. Henderson, 217 F.3d 1234, 1239-40 (9th Cir. 2000).

D. We review a Rule 12(b)(6) dismissal for failure to state a claim de novo, and accept as true all well-pleaded allegations of fact in the Complaint, construing them in the light most favorable to Plaintiff. Roe v. City of San Diego, 356 F.3d 1108, 1111-12 (9th Cir. 2004). Dismissal "is appropriate if it

appears beyond doubt that (Plaintiff) can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 1112 (internal quotation marks and citation omitted).

E. To establish a prima facie case of discrimination, a Title VII plaintiff must offer evidence that "give(s) rise to an inference of unlawful discrimination." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). The prima facie case may be established "either through the framework set forth in McDonnell Douglas Corp. v. Green or . . . (through) direct evidence of discriminatory intent." Vasquez v. County of L.A., 307 F.3d 884, 889 (9th Cir. 2002) (citation footnote omitted). Establishing a prima facie Title VII case in response to a motion for summary judgment requires only "minimal" proof and "does not even need to rise to the level of a preponderance of the evidence." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994); see also Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985) ("(S)ummary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits because the crux of a Title VII dispute is the `elusive factual question of intentional

discrimination.'" (quoting Burdine, 450 U.S. at 255 n. 8)).

WHITE v. BURLINGTON NORTHERN & SANTA FE RAILWAY, 364 F.3d 789 (6th Cir. 2004) SCHEFKE v. RELIABLE COLLECTION AGENCY, LTD., 96 Haw. 408 (2001) And under 42 U.S.C. 1981 PAVON v. SWIFT TRANSP. CO., INC., 192 F.3d 902 (9th Cir. 1999) Washington v. Garrett, 10 F.3d 1421, 1434 (9th Cir. 1994). LYONS v. ENGLAND, 307 F3rd 1092 (9th Cir. 2002); MATHEWSON v. ALOHA AIRLINES, INC., *82 Haw. 57* (1996) 919 P.2d 969.

The actions of the Defendants equal continuous harassment of Plaintiff from 1998 through 2005, when she filed this suit. The District court's ignoring of the administrative complains of harassment and unequal treatment filed by Plaintiff is improper. And so is his argument that the civil suit filed by Plaintiff in 2000, which went to trial in 2004 and which was still on appeal in 2005 and 2006, were not a direct or circumstantial cause of the retaliation suffered by Plaintiff. Even if there were no subsequent complaints of harassment and discriminatory union contract violations Plaintiff's complained of during 2000 to 2005, the fact that the suit filed in 2000 was on going and involved defendant Kilborn as a DOE interested witness, was improperly glossed over by the court. As the

Ninth circuit ruled in PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004).

> Breeden cannot be read as holding that causality is dependent, as a matter of law, on temporal proximity. Although a lack of temporal proximity may make it more difficult to show causation, "circumstantial evidence of a `pattern of antagonism' following the protected conduct can also give rise to the inference." Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3rd Cir. 1997) (citation omitted).
>
> The Third Circuit explained: It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.
>
> Our cases are consistent with this

approach. In Coszalter v.City of Salem, 320 F.3d 968, 977-78 (9th Cir. 2003), we cautioned that a "specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." In Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276, 1287 n. 10 (9th Cir. 2001), the majority rejected the dissent's argument that Breeden precluded the inferences drawn by the jury below. PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004)

6. CAUSE OF ACTION FOR VIOLATION OF STATE OF HAWAII FAIR EMPLOYMENT ACT SHOULD NOT BE DISMISSED

The actions of the Defendants mentioned above also violate the State of Hawaii Fair Employment Act Section 368 & 378 of the Hawaii Revised Statutes.

Under Schefke v. Reliable Collection Agency, Ltd., 96 Haw. 408, 32 P.3d 52 (Haw. 2001), the Hawaii Federal District Court clearly had pendent jurisdiction of the non-payment of wages claim under H.R.S. 378-2.. And the

District Court has original jurisdiction of the Plaintiff's lost wages claim under Title VII, 42 U.S.C. 2000(e) and 42 U.S.C. 1981. And for which causes of action Plaintiff established a prima facie case, and sufficient evidence Defendants stated reasons were pre-texts for discrimination in a hostile work environment PAVON v. SWIFT TRANSP. CO., INC., *192 F.3d 902* (9th Cir. 1999); GOFF v. CONTINENTAL OIL CO., 78 F.2d 593 (5th Cir. 1982); MATHEWSON v. ALOHA AIRLINES, INC., *82 Haw. 57* (1996) 919 P.2d 969.

The HCRC Rt to Sue letter is dated Sept. 23, 2005 - Complaint filed Jan. 3, 2006. After a holiday. Plaintiff Stephanie Stucky actually received the letter about a week later on Maui on Sept. 31, 2005 a Saturday giving her till Dec. 31, 2005 to file, which fell on a Saturday holiday week-end. To be a bit more precise and accurate than the general declaration filed Dec. 4, 2005 by counsel, after discussing it with Plaintiff. Therefore, the District court should have exercised it's pendent jurisdiction. Docket No. 45.

The NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN, 536 U.S. 101 (2002) & MORGAN v. NATIONAL R.R. PASSENGER, 300 F.3d 1144 (9th Cir. 2002) case holds that Plaintiff can present both direct and circumstantial evidence to prove his case of illegal discrimination on the job, and that includes all of the evidence of an "illegal pattern or practice of harassment or of a "hostile work environment" on the job even

though some of those facts may lie well outside the 300 day line. If they are similar in kind or circumstance relevant to actions of harassment that occurred within the 300 day line, they are admissible at trial.

> In Morgan, the Supreme Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," 122 S.Ct. at 2072, **while "a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful ≤employment≥ practice and at least one act falls within the time period,"**[fn6] id. at 2077. Abner J. Morgan, Jr., brought claims of disparate treatment, retaliation, and hostile work environment ≤racial≥ ≤harassment≥ against Amtrak, alleging inter alia that he was repeatedly denied training opportunities, subjected to unwarranted disciplinary action, and unlawfully discharged. LYONS v. ENGLAND, 307 F3rd 1092 (9th Cir. 2002.

The Plaintiff is entitled to present all of these related and interlocking facts of harassment and unfair treatment at the trial to present both the direct and the circumstantial evidence of discrimination in his case.

At the initial stage of a case of

disparate treatment, appropriate background evidence will be evidence, either direct or circumstantial, that, when combined with evidence of the employer's present conduct, "give(s) rise to an inference of unlawful discrimination." Burdine, 450 U.S. at 253. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (quoting Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

The district court will sometimes be required to engage in Rule 403 balancing when determining the admissibility of evidence of time-barred acts, Fed.R.Evid. 403 (stating that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by its potential for unfair prejudice or confusion of the issues), **bearing in mind that, in discrimination cases, probative evidence of wrongful intent will necessarily prejudice the defendant's case.**(fn13) LYONS v. ENGLAND, 307 F3rd 1092 (9th Cir. 2002.

Hence, Plaintiff has the right to present all of the evidence of her mistreatment on the job and after termination to the jury to determine whether Defendant pre-text for this discrimination is believable under the circumstances. Which it is not. Since, the very fact of her being the only employee repeatedly subjected to

elimination from the school staff, after filing a gender discrimination suit over unequal treatment, which continued and was on going, raises a primae facie case of discrimination, along with the other evidence harassment.

of The fact that the defendant may be able to produce evidence that the plaintiff was fired for a lawful reason **just creates an issue of fact: what was the true cause of the discharge? Evidence, though not conclusive, that the cause was retaliation should be enough to entitle the plaintiff to a jury trial unless the defendant can produce uncontradicted evidence that he would have fired the plaintiff anyway, in which event the defendant's retaliatory motive, even if unchallenged, was not a but-for cause of the plaintiff's harm**. Price Waterhouse v. Hopkins, 490 U.S. 228, 244- 45 (1989); Miller v. Illinois Dept. of Corrections, 107 F.3d 483, 484 (7th Cir. 1997); Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 658 (7th Cir. 1991) (en banc); Brown v. East Mississippi Electric Power Ass'n, 989 F.2d 858, 862 (5th Cir. 1993)., to determine whether Defendant pre-text for this discrimination is believable under the circumstances. Which it is not. COSTA v. DESERT PALACE, 299 F.3d 838 (9th Cir.

2002)

These facts are clear evidence Defendants assertions of departmental restructuring are merely pre-texts for the court not to allow a jury to examine the details of the Defendants actions. RA 89-138. NATIONAL RAILROAD PASSENGER CORPORATION v. MORGAN, 536 U.S. 101 (2002); MATHEWSON v. ALOHA AIRLINES, INC., 82 Haw. 57 (1996) 919 P.2d 969. The actions of the Defendants mentioned above also violate the State of Hawaii Fair Employment Act Section 368 & 378 of the Hawaii Revised Statutes.

7. CONCLUSION

The Appellate court came to an erroneous conclusion on the causation issues in this case. For causation, not temporal prerequisites are the real issue as stated in PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004).

> Although a lack of temporal proximity may make it more difficult to show causation, "circumstantial evidence of a `pattern of antagonism' following the protected conduct can also give rise to the inference." Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3rd Cir. 1997) (citation omitted).
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important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Our cases are consistent with this approach. In Coszalter v. City of Salem, 320 F.3d 968, 977-78 (9th Cir. 2003), we cautioned that a "specified time period cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long (or, conversely, a rule that any period under a certain time is per se short enough) would be unrealistically simplistic." In Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276, 1287 n. 10 (9th Cir. 2001), the majority rejected the dissent's argument that Breeden precluded the inferences drawn by the jury below. PORTER v.

CALIFORNIA DEPT. OF CORRECTIONS,
383 F.3d 1018 (9th Cir. 2004)

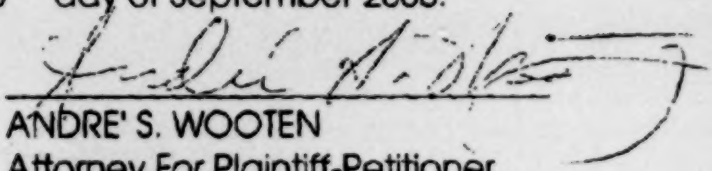
The District Judge erred when he granted the Defendant's Motion to Dismiss claiming there was insufficient proof of the Causal Connection. The Appellate court erred in affirming that decision.

The lower court Judges ignore the fact that the 1993 EEO complaint begat the 2000 EEO law suit Complaint which went to trial and continued on appeal in 2005. It is the same retaliatory and gender discriminatory treatment prevalent in the school's 2 music teacher Art Department, which was complained of by the Plaintiff-Petitioner in her EEOC complaint of 1998 and civil suit filed in 2000 to 2005 and indeed continues to the present day. PORTER v. CALIFORNIA DEPT. OF CORRECTIONS, 383 F.3d 1018 (9th Cir. 2004). Docket # 54. RA. Page 4-27.

Wherefore, Plaintiff-Petitioner, Stephanie Stucky respectfully requests that the U. S. Supreme Court grant this Petition for Certiorari and reverse and rescind the Ninth Circuit Court of Appeals and the Hawaii District Court's order granting the State of Hawaii Department of Education and Defendant Katherine Kilborn's Motions for Summary Judgment, and grant Plaintiff a trial by jury upon her gender discrimination and Civil Rights retaliation complaint filed in the Hawaii District Court on

January 3, 2006.

This 15th day of September 2008.

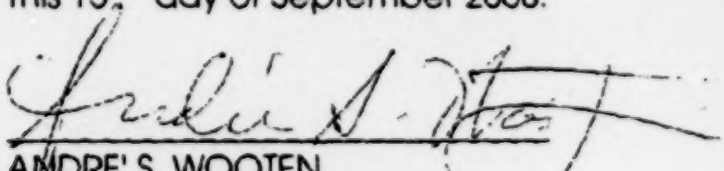


ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner,
STEPHANIE STUCKY

9. STATEMENT OF RELATED CASES

Plaintiff-Appellant, STEPHANIE STUCKY is not aware of any related cases pending presently before the U. S Supreme Court pertaining to these issues.

This 15th day of September 2008.



ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner,
STEPHANIE STUCKY

28-2.3 Attorneys Fees

Plaintiff seeks attorney's fees in this Civil Rights Action pursuant to section 706(k) of Title VII, 42 U.S.C. §§ 2000e-5(k), the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §§ 1988, and Ninth Circuit Rule 28-2.3.

NO.

IN THE UNITED STATES SUPREME COURT

STEPHANIE STUCKY,

Plaintiff - Appellee,

V.

DEPARTMENT OF EDUCATION, STATE OF HAWAII, ET. AL.

Defendants - Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellee certifies that the Plaintiff-Appellant's Opening Brief is printed in a proportionate space type face in a 12 point Century Gothic font, and contains 8,956 words and 41 pages, excluding the Cover page, Table of Contents, Certificate of Service and Certificate of Compliance.

DATED: Honolulu, September 17, 2008.

ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner,
STEPHANIE STUCKY

G. THE APPENDIX

ORDER DATED JUNE 20, 2008 DENYING PLAINTIFF-APPELLANT STEPHANIE STUCKY'S APPEAL AND AFFIRMING THE ORDER GRANTING DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEPHANIE STUCKY,	)	No. 07-15527
	)	
Plaintiff-Appellant;	)	D.C. No.
	)	CV-06-00002-
v.	)	JMS/lek
	)	
DEPARTMENT OF EDUCATION, STATE OF HAWAII; PATRICIA HAMAMOTO, Superintendent; KEN NOMURA, Complex Area Superintendent; CATHERINE KILBORN, Principal;	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, District Judge, Presiding

Submitted June 18, 2008
Honolulu, Hawaii

Before: GOODWIN, RYMER, AND IKUTA, Circuit Judges.

The district court did not err when it granted summary judgment to the defendants Stucky's Title VII retaliation claim. Contrary to Stucky's assertions, the last "protected activity" that she engaged in for purposes of her Title VII retaliation claim was the 2000 retaliation and discrimination complaint filed with the Hawaii Civil Rights Commission ("HCRC"). See Davis v. Team Elec. Co., 520 F.3d 1080, 1093-94 (9th Cir. 2008). The union grievances Stucky filed after 2000 do not qualify as protected activities because the record does not establish that they were lodged in opposition to Title VII violations. See 42 U.S.C. Section 2000e-3; Learned v. City of Bellevue, 860 F.2d 928, 932, (9th Cir. 1988) ("[T]he opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation."). Moreover, the initiation of the present lawsuit is not a protected activity for purposes of Stucky's retaliation claim in this case. In her complaint, Stucky did not allege that she was retaliated against for initiating the present lawsuit. As the district court noted, Stucky has filed a separate civil action in district court to address her contentions that she was retaliated against for initiating the present action.

The first act of alleged retaliation that Stucky points to took place in February 2005, that is, five years after Stucky's last protected activity. Even assuming that the alleged acts of retaliation qualify as adverse employment actions under the broad standard articulated in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 67-70 (2006), Stucky has not made any showing of a casual link between her protected activities and the

adverse employment actions taken by the defendants. See Freitag v. Ayers, 468 F.3d 528, 541 (9th Cir. 2006). The five-year gap between Stucky's last protected activity and her first alleged act of retaliation is too long to substantiate Stucky's claims that she was retaliated against for engaging in protected activity. See, e.g. Vasquez v. County of Los Angeles, 349 F.3d 634, 646 (9th Cir. 2004) (a thirteen month temporal distance is too long to support a causal link). Moreover, Stucky has not introduced any other "evidence of surrounding circumstances that show a retaliatory motive." Id. Finally, the fact that Stucky has other litigation pending is not sufficient evidence that defendants had a retaliatory motive. In sum, taking Stucky's factual allegations as true, and drawing all legitimate inferences therefrom in her favor, we conclude that Stucky has not established a "genuine issue[] of material fact" as to whether she was retaliated against in violation of Title VII. Davis, 520 F.3d at 1088.

The district court also did not err in granting summary judgment to the defendants on Stucky's Title IX gender discrimination claim. "[W]hen evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal prima facie case based on a McDonnell Douglas type assumption." Cornwell v. Electra Cent. Credit. Union, 439 F.3d 1018, 1029 n.8 (9th Cir. 2006) (internal quotation marks omitted). Stucky succeeded in making a prima facie showing by adducing evidence that she was treated differently than a similar situated male music teacher. However, once the defendants proffered

legitimate, non-discriminatory reasons for this disparate treatment, Stucky failed to produce any evidence that the defendants' reasons were pretextual. See Dominguez-Curry v. Nev. Transp. Dept., 424, F.3d 1027, 1037 (9th Cir. 2005) (to survive summary judgment, the plaintiff "must produce sufficient evidence to raise a genuine issue of material fact as to whether the employer's proffered nondiscriminatory reason is merely a pretext for discrimination"). Although "[t]he same evidence can be used to establish a prima facie case and to create a genuine issue regarding whether the employer's explanations are prextextual," Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 870 (9th Cir. 1996), here Stucky failed to introduce any evidence from which a reasonable jury could conclude that the defendants undertook the challenged employment

actions because of Stucky's sex, see Cornwell, 439 F.3d at 1028. Accordingly, the district court did not err in granting summary judgment to the defendants on the Title IX claim. See id. Finally, the district court did not err in declining to exercise supplemental jurisdiction over Stucky's state-law claims. District courts may exercise their discretion under 28 U.S.C. section 1367(c)(3) and decline to address pendant state-law claims after they have granted summary judgment to the defendant on the federal claims. See Trs. of Constr. Indus. & Laborers Health & Welfare Trust v. Desert Valley Landscape & Main., Inc. 333 F.3d 923, 926 (9th Cir. 2003).

AFFIRMED

NO.

IN THE UNITED STATES SUPREME COURT

STEPHANIE STUCKY,

Plaintiff - Appellee,

V.

DEPARTMENT OF EDUCATION, STATE OF HAWAII, ET. AL.

Defendants - Appellants.

CERTIFICATE OF SERVICE

I Hereby certify that a copy of the foregoing was served upon THE OFFICE OF THE ATTORNEY FOR DEFENDANTS ON September 18, 2008 by:

( ) Delivering same, postage prepaid,

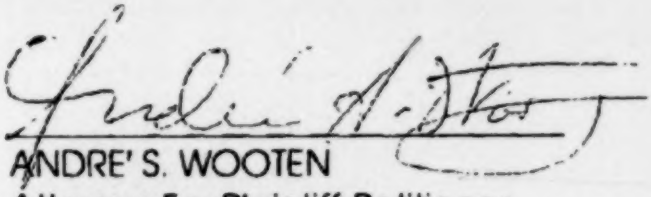
(x) Delivering to:

TO: OFFICE OF THE ATTORNEY GENERAL
STATE OF HAWAII
MARK BENNETT, ESQ., Attorney General

NELSON NABETA, ESQ. Deputy Attorney
General
235 Beretania Street, 15th Floor
Honolulu, Hawaii 96813

Attorneys for Defendants
DEPARTMENT OF EDUCATION, et. al.

DATED: HONOLULU, HAWAII, September 18, 2008.



ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner,
STEPHANIE STUCKY

Supreme Court, U.S.
FILED
SEP 18 2008
OFFICE OF THE CLERK

112

No. (2) 08-623

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHANIE STUCKY,
Petitioner

vs.

DEPARTMENT OF EDUCATION,
STATE OF HAWAII, ET. AL.
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES NINTH CIRCUIT COURT ORDER UPHOLDING JUDGMENT FROM THE DISTRICT OF HAWAII

CERTIFICATE OF SERVICE

ANDRE S. WOOTEN 3887
Counsel of Record
ANDRE S. WOOTEN
Attorney at Law
Century Square, Suite 1909
1188 Bishop Street
Honolulu, Hawaii 96813
Telephone No. (808) 545-4165

Counsel of Record for Petitioner
STEPHANIE STUCKY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

STEPHANIE STUCKY,	CIVIL NO.06-00002 JMS/LEK
Plaintiff,	
v.	
STATE OF HAWAII, DEPARTMENT OF EDUCATION; PATRICIA HAMAMOTO, Superintendent; KEN NOMURA, Complex Area Superintendent; CATHERINE KILBORN, Principal,	
Defendants.	

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Stephanie Stucky ("Stucky") alleges that Defendants State of Hawaii Department of Education ("DOE"), Catherine Kilborn ("Kilborn"), Ken Nomura ("Nomura"), and Patricia Hamamoto retaliated against her in violation of Title VII, discriminated against her on account of her gender in violation of Title IX, violated the Hawaii Fair Employment Act, and acted with such

malice as to be liable for punitive damages. The Defendants moved for a judgment on the pleadings or, in the alternative, for summary judgment. For the following reasons, the court GRANTS the Defendants' motion for judgment on the pleadings or, in the alternative, for summary judgment.

II. BACKGROUND

As a preliminary matter, the court notes that the record before it is thin. The only evidence that Stucky has provided to the court is her own nine paragraph declaration. Stucky has not provided the court with any documents, testimony, third party declarations, or other support to substantiate her account of events. The Defendants' evidence is similarly scarce, consisting only of Kilborn's declaration and two additional exhibits. The following factual background comes from this record and the Complaint. In setting forth these facts, the court draws all reasonable inferences in favor of Stucky, the non-moving party.

A. Factual Background

The DOE has employed Stucky as a teacher at Iao Intermediate School ("Iao Intermediate") on Maui since 1982. Stucky is one of two music teachers at Iao Intermediate. During her tenure at Iao Intermediate, Stucky has filed several grievances, claims, and lawsuits. On November 17, 1998, Stucky filed an age discrimination complaint with the Hawaii Civil Rights Commission ("HCRC") against the DOE. Stucky filed several union grievances against the DOE, DOE administrators, and the then-principal of Iao Intermediate in the late 1990s and early 2000. On January 11, 2000, Stucky filed a retaliation and

discrimination complaint with the HCRC against the DOE.

Kilborn has been employed by the DOE since 1991 and has served as the principal of Iao Intermediate since 2003. At the time of Stucky's previous legal filings, Kilborn was the vice-principal of Iao Intermediate.

As principal, Kilborn supervises the work of Iao Intermediate's teachers. On February 17, 2005, Kilborn asked Stucky to provide a written explanation of her grades and grading policy. According to Stucky, Iao Intermediate does not have a standard grading policy for teachers to follow and Kilborn did not ask other teachers for explanations of their grading policies or grades. Stucky failed to provide Kilborn with a written explanation of her grading policies and grades, leading Kilborn to issue a written reprimand on February 25, 2005. Kilborn Decl. ¶ 6; Kilborn Decl. Ex. A.

As part of her responsibilities, Kilborn also oversaw school expenditures. At some point in time, Stucky filed a request to purchase various art supplies for her classroom. According to Stucky, the DOE had $3,000 annually allocated to the music department for Stucky's use. Stucky Decl. ¶ 8. Nonetheless, Kilborn delayed or denied Stucky's requests for books and instruments. *Id.* According to Stucky, Kilborn did not deny purchase requests from other teachers. Kilborn contests Stucky's version of the events, stating that she did not deny any purchase requests which Stucky properly brought before her. Kilborn Decl. ¶ 5.

Stucky's music classroom was moved to the Iao Intermediate's cafeteria in an apparent attempt to make room for a computer class. Kilborn Decl. ¶ 8. There is some confusion as to whether Stucky's former music classroom was ever used as a computer lab; in her declaration, Stucky claims that the computer lab was

never created, but during oral argument, Stucky's counsel conceded that it had been created, although not for several months following the relocation. Regardless, Stucky asserts that Kilborn improperly and unilaterally relocated Stucky's classroom but did not change the location of the other music teacher.[1] According to Stucky, the cafeteria was unsuitable for music classes, lacked security storage for the instruments, and was infested with fleas and rats. Stucky Decl. ¶¶ 4, 6. Kilborn disputes that the cafeteria was infested with vermin, and alleges that Stucky manufactured the false tale and spread it amongst her students. Kilborn Decl. ¶ 8. When parents complained to Kilborn about the infestation, Kilborn instructed Stucky to discontinue such communications. *Id.* Stucky also claimed that she was reprimanded for attempting to investigate the thefts of two ukeleles stolen from the cafeteria.

Kilborn claims that Stucky repeatedly discussed her disputes and disagreements with the department and school during class. Kilborn Decl. ¶ 7. After receiving complaints filed by parents in 2005, Kilborn instructed Stucky to refrain from engaging in such discussions. Id. In response, Stucky states that she conversed on school, rather than personal, matters with parents. Stucky Decl. ¶ 4. Stucky does not clarify whether she ever spoke of her disputes with school officials in front of, or with, students during class time.

On April 5, 2005, Kilborn proposed reducing the offerings at Iao Intermediate and replacing Stucky's music class with a class in reading, mathematics, or

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[1] It is unclear from the record whether the other music teacher shared the same classroom as Stucky or taught in another room which was not earmarked for conversion into a computer lab.

world languages. If enacted, the proposal would have eliminated Stucky's teaching position. Nomura, the DOE Complex Area Superintendent for the Baldwin-Kekaulike-Maui area, concurred with Kilborn's proposal. The Hawaii State Teachers Association ("HSTA") found that the action violated the HSTA-DOE contract and as a result did not vote on the proposed reduction. Stucky Decl. ¶ 7. As some point around this time, Stucky herself filed a grievance regarding the improper staff reduction. *Id.* Due to internal inconsistencies in Stucky's own filings, it is unclear whether Stucky was terminated and then reinstated, *see* Stucky Decl. ¶ 7; Wooten Supplemental Decl. ¶ 9, or whether the termination was threatened but never voted on or finalized. Stucky Decl. ¶ 7; Wooten Supplemental Decl. ¶ 11; *see also* Kilborn Decl. ¶ 9. Regardless, at the time she filed her present Complaint, Stucky was still employed at Iao Intermediate.[2]

B. Procedural Background

Stucky filed suit against the DOE, Kilborn,

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[2] In her opposition memorandum and declaration, Stucky claims that after she filed her complaint in this court, the Defendants improperly suspended Stucky without pay for failing to help a student who was injured. This suspension formed the basis of a prior TRO which the court considered and denied on April 14, 2006. Stucky now argues that this suspension is retaliation for filing the present suit. This retaliation claim, and the corresponding facts, will not be considered by the court at this time as they were not included in Stucky's Complaint but instead form the basis of a separate Complaint filed by Stucky on November 2, 2006 against the same defendants. See *Stucky v. State of Hawaii Department of Education, et al.*, Civ. No. 06-00594 JMS/KSC.

Nomura, and DOE Superintendent Patricia Hamamoto in their official capacities (collectively "State Defendants") on January 3, 2006 alleging retaliation in violation of Title VII (Count I); gender discrimination in violation of Title IX (Count II)l violation of Hawaii Fair Employment Act (Count III); and mischief or criminal indifference sufficient to sustain a claim for punitive damages (Count IV). Stucky also sued Kilborn in her individual capacity.[3] Stucky also filed two temporary restraining orders, both of which this court denied.

Kilborn, acting in her individual capacity, filed a Motion for Judgment on the Pleadings on September 22, 2006. The State Defendants then filed a Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment on September 27, 2006. Stucky filed a Memorandum in Opposition to Kilborn's motion to dismiss on November 9, 2006, Stucky did not file a Memorandum in Opposition to the State Defendants' Motion.

The court heard oral arguments on November 27, 2006. At oral arguments, the court ordered supplemental briefing as to whether Stucky had exhausted her administrative remedies prior to filing in

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[3] When referring to the "State Defendants", the court includes Kilborn acting in her official capacity. Claims against Kilborn acting in her individual capacity are referenced as such. The court uses the term "Defendants" to collectively refer to all State Defendants and Kilborn acting in her individual capacity.

federal court.[1] The parties filed the required briefing on December 11, 2006. This Order followed.

III. STANDARDS OF REVIEW

A. Motions for Judgment on he Pleadings

Federal Rule of Civil Procedure 12(c) allows a party to move for judgment on the pleadings. Courts will grant judgment on the pleadings only where the plaintiff has failed to state a claim upon which relief can be granted. A court will accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Lee v. City of LA.*, 250 F.3d 668, 679 (9th Cir. 2001). A complaint will not be dismissed under Rule 12 "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

B. Motions for Summary Judgment

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the non-moving party.

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[1] The Supplemental filings and exhibits show that Stucky received a "right to sue" letter from the Department of Justice dated October 20, 2005. Stucky filed her Complaint in this court within the prescribed 90-day window. As such, the court concludes that Stucky properly exhausted her administrative remedies as to her federal claims.

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is material if the resolution of the factual dispute affects the outcome of the claim or defense under substantial law governing the case. See *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001); *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving parties bear the initial burden of demonstrating to the court that there is no factual dispute regarding those claims for which summary judgment is sought. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987). Once the moving party does so, the burden falls upon the non-moving party to demonstrate that a triable issue of fact does exist. As such, "summary judgment is mandated if the non-moving party 'fails to make a showing sufficient to establish the existence of an element essential to that party's case.'" *Broussard v. Univ. of Cal. at Berkeley*, 192 F.3d 1252, 1258 (9th Cir. 1999) (*quoting Celotex*, 477 U.S. at 322).

IV. ANALYSIS

A. The State Defendants Are Entitled to Summary Judgment on the Claims for Retaliation in Violation of Title VII.

The court evaluates Stucky's Title VII retaliation

claims under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the *McDonnell Douglas* framework, Stucky must first set forth evidence sufficient to make prima facie retaliation claim under Title VII. To do so, Stucky must show that (1) she engaged in a protected activity opposing an unlawful employment practice; (2) she was subjected to an adverse employment action; and (3) the adverse employment action she suffered was casually connected to her participation in the protected activity. *Freitag v. Ayers*, 468 F.3d 528, 541 (9th Cir. 2006); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004); *Vasquez v. County of L.A.*, 349 F.3d 634, 646 (9th Cir. 2003).

1. Protected Activity

Both parties agree that Stucky engaged in protected activities, namely a 1998 age discrimination complaint filed with the HCRC and a 2000 retaliation and discrimination complaint filed with the HCRC.[5] However, Stucky additionally claims that union grievances filed against various school officials in 2000 also qualify as protected activities. The court disagrees. To constitute a "protected activity", a complaint, grievance, or claim must oppose Title VII violations. *See Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) ("[T]he opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation."); *Silver v. KCA, Inc.*, 586 F.2d 138, 142 (9th Cir. 1978) ("[U]nder the clear language of the 'opposition' clause...a case of retaliation has not been

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[5] Kilborn was not named as a defendant in any of Stucky's HCRC complaints. Kilborn Decl. ¶ 3.

made out unless the 'retaliation' relates to the employee's opposition to a [Title VII] violation.") Grievances filed for simple contract violations of collective bargaining agreements do not qualify.[6] Thus, only Stucky's 1998 and 2000 discrimination and retaliation claims constitute protected activities.

2. Adverse Employment Actions

The State Defendants argue that Stucky was not subjected to adverse employment actions because while Stucky was purportedly reprimanded, denied classroom supplies, relocated, and threatened with termination, she was not actually fired from her position. The court rejects the State Defendants' arguments.

Under the standard set forth by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006), adverse employment actions for a Title VII retaliation claim consist of those actions likely to dissuade or deter a reasonable employee from making or supporting a charge of discrimination. *Id.* at 2414-15. If proven, elevated scrutiny, relocation of classroom location, reprimands, denial of supplies, and threatened termination are within the realm of actions anticipated by *Burlington* as the type of actions that could intimidate or punish an

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[6] This, of course, assumes that the "simple contract violations" do not concern protected activity or status. If a contract violation pertains to one's race or gender, for example, a grievance regarding that contract violation would constitute a protected activity. As Stucky has failed to introduce any evidence regarding the nature of these previous union contract grievances, the court cannot find that they are protected activities within the meaning of a Title VII retaliation claim.

employee, thereby discouraging her from filing future discrimination complaints. The court thus finds that Stucky has met her burden of setting forth a prima facie claim that she suffered adverse employment actions.

3. Causal Connection

To establish causation, Stucky must show "by a preponderance of the evidence that engaging in the protected activity was one of the reasons for [her] firing and that but for such activity [she] would not have been fired." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064-65 (9th Cir. 2002) (citations omitted). Stucky has failed to meet this burden.

Stucky engaged in the relevant protected activity in late 1998 and early 2000. The retaliatory acts she complains of began approximately five years later in early 2005. While court may infer causation based on a close temporal proximity between the protected activity and alleged violation, the retaliation must be "fairly soon" after the protected activity. *Id.* at 1065. A temporal distance of several months makes a causal link more difficult to prove; a distance of five years severely undermines it. *See, e.g., Manatt v. Bank of America, NA*, 339 F.3d 792, 802 (9th Cir. 2003) (nine months not sufficiently close to create causal link); *Vasquez v. County of L.A.*, 349 F.3d 634, 646 (9th Cir. 2003) (thirteen month gap was too long to establish causal connection); *Villiarimo*, 281 F.3d at 1065 (eighteen months too long to establish causal connection).

Nor has Stucky come forward with any other evidence that could constitute the semblance of a causal link. She fails to set forth any nexus between her HCRC complaints in 1998 and 2000 and Kilborn's action in 2005. In fact, Kilborn was not named in Stucky's HCRC complaints, and Stucky has provided no detail as to her

relationship with Kilborn between 1998 and 2005. Thus, the entire claim of retaliation is premised on HCRC complaints filed seven and five years prior to the adverse employment actions.

Stucky's declaration is void of any evidence demonstrating that Kilborn – who purportedly reprimanded Stucky, refused to purchase Stucky's requested supplies, and eventually proposed Stucky's removal – harbored a retaliatory motive. Stucky's declaration states that when Kilborn was a vice-principal, she testified on behalf of her former boss who was sued by Stucky over five years earlier. Stucky Decl. ¶ 2. Even if true, this fails to establish a causal link between that event and Stucky's treatment in 2005.[7] Moreover, Kilborn's decision to remove Stucky was approved by Nomura and there is no evidence on the record to show that he harbored a retaliatory animus or was merely "rubber stamping" Kilborn's retaliatory decision. See *Funai v. Brownlee*, 369 F. Supp.2d 1222, 1232 (D. Haw. 2004) ("a plaintiff can...prove causation by presenting evidence that the decision maker simply 'rubber stamped' the decision of a subordinate who did have a retaliatory motive.").

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[7] In any event, Kilborn's previous court testimony appears unrelated to any protected activity. Stucky's declaration states that "And principal Kilborn continues to retaliate against Plaintiff for filing grievances over union contract violations at the school, as Plaintiff had over violations caused by former principal Ayson, for whom Defendant Kilborn testified in 2nd Circuit court, as her Vice Principal. [All errors in original.]" Stucky Decl. ¶ 2. This awkwardly worded phrasing demonstrated that Stucky's retaliation claim – and by extension the attempted causal link based upon Kilborn's past testimony – relates to union contract grievances filed against Kilborn's former boss, and not to Title VII protected activity.

Stucky also claims that her music classroom was relocated to make room for a computer course, but that the Defendants did not relocate the other music teacher and either did not create the computer lab or delayed creating it for several months.[8] Again, Stucky has failed to offer any evidence to show a nexus between her aged HCRC complaints and the classroom relocation. Further, Kilborn claims that the decision to relocate Stucky's music classroom was made by the school, and not her.

Under Celotex, when a defendant sets forth a statement of the law and set of facts justifying summary judgment, the plaintiff bears the burden of showing that the facts or law are not as demonstrated. Stucky has utterly failed to do so here. Rather than disputing the facts or legal arguments presented in either the State Defendants' or Kilborn's motions, Stucky – through her legal counsel – attempts to raise new and alternative legal claims for the first time,[9] makes confusing

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[8] Stucky's pleadings state that the computer lab was never created. However, during oral argument, Stucky's counsel admitted that the computer lab had been created, albeit after a delay of several months. The court is unaware of the reason for the delay.

[9] Stucky's opposition memorandum references eleven causes of action, including claims for violation of 42 U.S.C. §§ 1981, 1981A, 1983, 1985, 1986, and intentional infliction of emotional distress. Mem. in Opp'n to Def. Catherine Kilborn for Dismissal 2. Just a page later, Stucky includes additional claims, writing about the "clear violation of Plaintiff's 14th Amendment Right to equal opportunity to contract and do business and non-discrimination in employment. [Incomplete sentence and capitalization errors in original.] And it is also done in illegal retaliation for Plaintiff's exercising his [sic] 1st and 14th Amendment right [sic] to petition for redress by filing an administrative and judicial Complaint.

(continued...)

arguments for injunctive relief,[10] unnecessarily block quotes cases,[11] and copies and pastes verbatim the text

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[9] (..continued)
concerning the Defendants [sic] past acts of discrimination and violation of the laws against Plaintiff." *Id.* at 3. For good measure – and in case the court wasn't sufficiently confused – Stucky also references 42 U.S.C. § 12101, the American Disabilities Act § 504. *Id.* at 11. Stucky's attorney, Andre S. Wooten, has certainly been known to "cut and paste" irrelevant material into his pleadings. The court is uncertain if Stucky intended to make these irrelevant claims in her case, or if Mr. Wooten simply engaged in thoughtless copying from his pleadings in other matters. To the extent that Stucky did intend to raise these claims, the court finds that they go well beyond anything alleged in Stucky's Complaint which included only four causes of action, including claims for violations of Title VII, Title IX, Hawaii Fair Employment Act, and punitive damages. The sole time the Complaint mentions 42 U.S.C. §§ 1981, 1981A, 1983, 1985, 1986, and 12101 is in the jurisdiction statement; this reference does not provide sufficient notice to the Defendants of the claims. As it would be terribly unfair to Defendants to allow Stucky to add new claims by raising them for the first time in her opposition to a motion for judgment on the pleadings or for summary judgment, these new claims, to the extent Stucky intended to raise them, are dismissed. More to the point, these new legal claims do nothing to sustain Stucky's burden as to causation (or, for that matter, as to pretext).

[10] Stucky spends time arguing that "Plaintiff is entitled to an in need of injunctive relief. Suspension with out [sic] pay would permanently damage her reputation and career as a music teacher with the Defendant D.O.E." Mem. In Opp'n to Mot. of Def. Catherine Kilborn for Dismissal 8, 11. This argument is irrelevant to the instant motions.

[11] Of the fourteen pages included in her opposition memorandum, five pages are filled with block quotes of cases, some of which are only marginally relevant.

of the Complaint.[12] Stucky utterly fails to set forth facts to show that Kilborn acted out of a retaliatory motive.

Given the forgoing, Stucky has failed to meet her legal burden of alleging facts sufficient to show causation. The court therefore GRANTS the State Defendants' motion for summary judgment as to the Title VII claims.[13]

B. The State Defendants Are Entitled to Summary Judgment As to Stucky's Claims for Gender Discrimination in Violation of Title IX

Title IX prohibits gender discrimination by educational institutions receiving federal assistance. 20 U.S.C. § 1681(a). Title IX discrimination claims are

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[12] Pages 4-7 of Stucky's opposition motion are verbatim copies – including paragraph numbers – of paragraphs 8-29 of Stucky's Complaint.

[13] If Stucky has been able to make out a prima facie claim under Title VII for retaliation – which she did not – the State Defendants would have been obligated under the *McDonnell Douglas* burden shifting framework to set forth a legitimate, non-retaliatory reason for their actions. The State Defendants did so, asserting that Kilborn's actions resulted from complaints from parents and Kilborn's supervisory role. Since the State Defendants set forth legitimate, non-retaliatory reasons for their actions, the burden would shift back to Stucky to show that these proferred explanations are either not worthy of credence or are pretextual. Stucky failed to do so as she has not offered any evidence showing a retaliatory animus on the part of Kilborn or casting doubt as to the credibility of the DOE's explanation of events. Kilborn was not the Principal of Iao Intermediate at the time Stucky filed her complaints in 1998 and 2000 and was not named in any of these actions. Indeed, although Kilborn was a witness in one of those previous claims, nothing in Stucky's moving papers demonstrates that Kilborn harbored a retaliatory animus as a result of these actions.

governed by the standards applied to Title VII discrimination claims. *See Weinstock v. Columbia Univ.*, 224 F.3d 33, 42 n.1 (2d Cir. 2000); *Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996) ("[T]he method of evaluating Title IX gender discrimination claims is the same as those in a Title VII case"); *Preston v. Commonwealth of Virginia ex rel New River Comm. College*, 31 F.3d 203, 207-08 (4th Cir. 1994) (holding that a Title IX discrimination claim can be evaluated in accordance with principles governing Title VII claims). The *McDonnell Douglas* burden shifting standards apply to Stucky's Title IX gender discrimination claims. See *Burch v. Regents of Univ. of Cal.*, 433 F.Supp.2d 1110, 1125 (E.D. Cal. 2006).

1. Stucky Has Set Forth a Prima Facie Gender Discrimination Claim

To set forth a prima facie Title IX gender discrimination claim, in addition to proving that the DOE received federal assistance, Stucky must show that (1) she belongs to a protected class; (2) she was qualified for her job; (3) she suffered an adverse employment action; and (4) Stucky's employer treated her differently than a similarly situated individual not belonging to her protected class. *See Cornwell v. Electra Cent. Union*, 439 F.3d 1018, 1028 (9th Cir. 2006) (setting forth elements of a prima facie case under Title VII). Here, Stucky is a female and as such belongs to a protected class. Further, there is nothing suggesting that after 20 years of teaching, she was so incapable of performing her responsibilities that she was disqualified from Title VII or Title IX protection. The court therefore turns to the final two criteria.

a. Adverse employment action

The standard for an adverse employment action for discrimination claim differs from that of a retaliation claim discussed *supra*. Rather than merely being an act which would discourage an employee from filing future claims, an adverse action for a discrimination claim must materially affect the compensation, terms, conditions or privileges of the plaintiff's employment. *See* 42 U.S.C. § 2000e-2(a)(1). Apart from the confusion as to whether Stucky was fired and then reinstated or only threatened with termination, the record does not indicate that the terms of Stucky's employment were altered and indeed shows that in the time period relevant to this claim, Stucky received her standard salary.[14]

Nonetheless, the court is concerned that Kilborn and Nomura purportedly planned to terminate Stucky – and according to Stucky actually did so – but reversed their decision only after Stucky filed union grievances and after the HSTA declared that the termination

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[14] As previously mentioned, Stucky claims in her opposition memorandum that the State Defendants retaliated against her for filing the present suit by suspending her without pay. While a suspension without pay would constitute an adverse employment action for the purposes of setting forth a prima facie Title IX claim, that suspension is not included in the matter presently before this court as it forms the basis of Stucky's subsequent complaint against both the State Defendants and Kilborn.

violated the HSTA-DOE contract.[15] A plaintiff with a legitimate gender discrimination claim should not be automatically barred from bringing her complaint merely because other independent forces acted to thwart the discriminatory acts of her supervisors. However, given the court's ultimate determination that Stucky has failed to demonstrate pretext, a full consideration of this issue is not presently warranted. In light of the court's concern over Kilborn's purported conduct and the fact that the record is unclear as to whether Stucky was actually terminated and reinstated or merely threatened with termination, the court finds for the purposes of this motion that Stucky has shown an adverse employment action.

b. Disparate treatment as compared to similarly situated males.

Stucky has, at the most basic level, shown that she received disparate treatment as per at least one similarly situated male. When liberally making every inference in favor of Stucky, the court can infer that Stucky, a female, was required to provide written explanations of her grading policies, denied supplies, and had her music classroom relocated while another

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[15] The court raised this concern at oral arguments and gave the parties an opportunity to file additional briefing on this issue. The supplement briefs, however, did not adequately answer the court's questions. Since the court must construe the facts in the light most favorable to the non-moving party and make every reasonable inference on behalf of the non moving party, and since the State Defendants failed to offer a factual account of the timeline of events leading up to the termination decision, the court accepts as true Stucky's version of events.

male music teacher[16] was not subjected to the same requirements.

2. The State Has Forwarded Legitimate, Non-Discriminatory Reasons

The State Defendants have forwarded legitimate, non-discriminatory reasons for their actions. Specifically, the State Defendants assert that they had received complaints from parents regarding Stucky's behavior; that the music classroom was being relocated in order to make room for a computer lab; and that in 2005 the school proposed abolishing certain elective classes (including music) and replacing those classes with additional classes in reading, mathematics, and world languages.

3. Stucky Has Failed to Demonstrate Pretext

Even if all of Stucky's allegations regarding her treatment vis-a-vis the treatment of the second male music teacher are true, a sample size of two individuals is not sufficient to allow the court to infer discrimination. *See e.g., Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662-63. (9th Cir. 2002) (declining to find racial discrimination from a small sample size); *accord Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1075 (9th Cir. 1986). Evidence drawn from such a small sample size has little predictive value and will not be relied upon by the court, especially when Stucky has a much larger population to draw from, namely, the other teachers at Iao Intermediate. Stucky failed to demonstrate that any other female teacher was

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[16] Counsel clarified during oral argument that the second music teacher at Iao Intermediate was a male.

treated equally poorly or that any other similarly situated male teacher received more favorable treatment. She has also failed to offer any other evidence tending to show pretext. Based on this, the court cannot conclude that Stucky was targeted or discrimination against on account of her gender.

C. Title Vii and Title IX Claims Against Kilborn Acting in Her Individual Capacity Are Dismissed

Stucky asserts both a retaliation claim and a gender discrimination claim against Kilborn acting in her individual capacity. However, as counsel conceded during oral argument, neither Title VII nor Title IX provide for individual liability. *See Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1189 (9th Cir. 1998) (determining there is no individual liability under Title VII); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1170 n.12 (11th Cir. 2003) (noting that Title IX does not provide for individual liability). Thus, the court dismisses both the Title VII retaliation claim and Title IX gender discrimination claim against Kilborn in her individual capacity.

D. Claims for Violation of the Hawaii Fair Employment Act and for Punitive Damages Are Dismissed

The only claims still remaining are counts III and IV, for violation of the Hawaii Fair Employment Act (Hawaii Revised Statute Chaps. 368 & 378) and punitive damages respectively. The court observes that there is a question as to whether these claims were

timely filed,[17] but also notes that the timeliness of the state claims, including issues as to the applicable statute, tolling, or equitable estoppel, have not been fully addressed or briefed by the parties. Under 28 U.S.C. § 1367(c)(3), "district courts may decline to exercise supplemental jurisdiction over a claim...[if] the district court has dismissed all claims over which it has original jurisdiction[.]" As a court of limited jurisdiction, the court declines to exercise supplemental jurisdiction over the Hawaii Fair Employment Act and punitive damage claims and hereby dismisses them pursuant to § 1367(c)(3).

V. CONCLUSION

For the previously discussed reasons, the court GRANTS the State Defendants' motion for summary judgment as to counts I and II and DISMISSES the remaining counts III and IV as the State Defendants. The court also DISMISSES counts I, II, III, and IV against Kilborn acting in her individual capacity. The clerk of the court is hereby directed to CLOSE the case file.

IT IS SO ORDERED.

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[17] Stucky received a right to sue letter from the HCRC dated September 23, 2005 giving her a 90-day window after receipt of the letter in which to bring suit for violation of Hawaii state laws. On the record before the court, Stucky claims to have received the letter on September 30, 2005, giving her under December 29, 2005 to file her state law claims. However, Stucky did not file her Complaint until January 3, 2006. Stucky correctly points out that December 31, 2005 and January 1 both fell on a weekend, and that January 2, 2006 was a holiday. However, this is irrelevant as her final day to file her Complaint was December 29, 2005, a Thursday.

NO.

IN THE UNITED STATES SUPREME COURT

STEPHANIE STUCKY,

Plaintiff · Appellee,

V.

DEPARTMENT OF EDUCATION, STATE OF HAWAII, ET. AL.

Defendants · Appellants.

CERTIFICATE OF SERVICE

I Hereby certify that a copy of the foregoing was served upon THE OFFICE OF THE ATTORNEY FOR DEFENDANTS ON October 20, 2008 by:

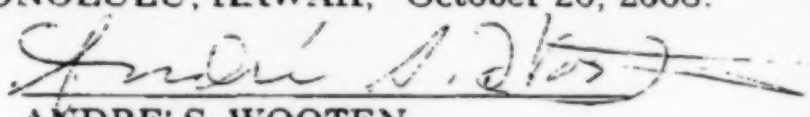
( ) Delivering same, postage prepaid,

(x) Delivering to:

TO: OFFICE OF THE ATTORNEY GENERAL
STATE OF HAWAII
MARK BENNETT, ESQ., Attorney General
NELSON NABETA, ESQ. Deputy Attorney General
235 Beretania Street, 15th Floor
Honolulu, Hawaii 96813

Attorneys for Defendants
DEPARTMENT OF EDUCATION, et. al.

DATED: HONOLULU, HAWAII, October 20, 2008.



ANDRE' S. WOOTEN
Attorney For Plaintiff-Petitioner
STEPHANIE STUCKY